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No. 86-1019

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND; SIGN, PICTORIAL AND DISPLAY INDUSTRY WELFARE FUND,

Petitioners,

vs.

FORMETRICS, INC., a corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the ruling below--which correctly holds that an employer's failure to make pension contributions after the expiration of the collective bargaining agreement would be an unfair labor practice within the exclusive, primary jurisdiction of the NLRB, and which is consistent with the decisions of every Court of Appeals to address the issue--require review by this Court?[1]

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1 The parties are set forth in the title; respondent Formetrics, Inc. has no parent company, and no ownership interest in any other company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Until January 1984, respondent Formetrics, Inc. was a party to multi-employer collective bargaining agreements with Local 510 of the Sign, Display and

Allied Crafts Union (the "Union"). Pursuant to those agreements, Formetrics made monthly contributions on behalf of its employees to the Sign, Pictorial and Display Industry Pension Trust Fund and the Sign, Pictorial and Display Industry Welfare Fund (the "Trust Funds") (Excerpt of Record ("ER") 17).

In January 1984, Formetrics timely withdrew from the multi-employer association that had negotiated the original agreements on behalf of Formetrics and other employers. On January 27, 1984, the Union notified Formetrics of the Union's intent to modify the then-current collective bargaining agreement, thereby terminating the agreement as of March 31, 1984 (ER 17).

In April 1984, Formetrics was advised that the Union had agreed upon a new contract with the multi-employer association. The Union did not ask Formetrics

to negotiate individually with the Union (ER 17).

Formetrics did not sign any new collective bargaining agreement with the Union. Thus, as of March 31, 1984, there existed no contract obliging Formetrics to continue making contributions to the Trust Funds (ER 17).

On September 21, 1984, less than six months after the expiration of the collective bargaining agreement, the Trust Funds filed an action against Formetrics for contributions allegedly due prior to the March 31, 1984 contract expiration, as well as for contributions allegedly due after the expiration of the contract. The Trust Funds claimed that Formetrics' failure to pay contributions violated section 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1145. Jurisdiction was asserted under section 502 of ERISA, 29 U.S.C. § 1132, and

section 301 of the Labor Management Relations Act, as amended ("LMRA"), 29 U.S.C. § 185 (ER 1).

Cross-motions for partial summary judgment were filed. Formetrics admitted that it owed contributions for the period through March 31, 1984, but denied that it was obligated to make contributions after the contract expired. Formetrics asserted that the district court lacked subject matter jurisdiction over an action for contributions allegedly accrued after the expiration of the contract (ER 13, 17).

The district court dismissed the post-contract claim, agreeing that the National Labor Relations Board ("NLRB") had exclusive jurisdiction over claims for contributions allegedly due after the March 31, 1984 expiration of the collective bargaining agreement (Pet.Appx. B).

The Trust Funds appealed the ruling. During the pendency of that appeal, the Ninth Circuit held in Lab. Health & Wel. Trust v. Adv. Lightweight Concrete (9 Cir. 1985) 779 F.2d 497 that the primary jurisdiction of the NLRB preempts a trust fund's action in district court to recover contributions for the period after expiration of a collective bargaining agreement. In light of its decision in Advanced Lightweight Concrete, the Ninth Circuit summarily affirmed the district court's ruling in favor of Formetrics (Pet.Appx. A).

A petition for a writ of certiorari has been filed in Advanced Lightweight Concrete (No. 85-2079), and the Trust Funds have requested that this case be joined with Advanced Lightweight Concrete (Pet., p. 4).

ARGUMENT

The Ninth Circuit correctly held in Advanced Lightweight Concrete that an employer's failure to make contributions to a trust fund after the expiration of the collective bargaining agreement would be actionable only as an unfair labor practice within the exclusive, primary jurisdiction of the NLRB. Consistent with the decisions of every Court of Appeals to address the issue, the Ninth Circuit correctly held that the NLRB's jurisdiction preempts a district court action under ERISA to enforce an alleged obligation to make contributions following the expiration of the agreement. Any such obligation could arise only from the National Labor Relations Act; any violation of such an obligation is an unfair labor practice. Nothing in ERISA confers district court jurisdiction over such claims.

I. THE NINTH CIRCUIT'S DECISION IN ADVANCED LIGHTWEIGHT CONCRETE IS CONSISTENT WITH EVERY OTHER COURT OF APPEALS DECISION ADDRESSING THE ISSUE.

The Ninth Circuit's decisions in Advanced Lightweight Concrete and the instant case are consistent with every other Court of Appeals decision to address the issue presented (Moldovan v. Great Atlantic & Pacific Tea Co., Inc. (3 Cir. 1986) 790 F.2d 894, pet. certiorari pending, nos. 86-203, 86-208; U.A. 198 Health & Welfare v. Rester Refrigeration (5 Cir. 1986) 790 F.2d 423, pet. certiorari pending, no. 86-262).

As explained in Advanced Lightweight Concrete and as discussed below (infra, pp. 13-16), an employer's failure to pay trust fund contributions after a collective bargaining agreement has expired is actionable only as an unfair labor practice. Any duty to make such

contributions derives from section 8(a)(5) of the National Labor Relations Act and, accordingly, the exclusive, primary jurisdiction of the NLRB preempts any district court action.

Contrary to petitioner's assertion (Pet., pp. 7-11), neither the language of section 515 of ERISA nor its legislative history suggests that Congress intended to create an exception to the NLRB's exclusive jurisdiction. Section 515 requires contributions to be made by an "employer who is obligated to make contributions to a multi-employer plan * * * under the terms of a collectively bargained agreement" (29 U.S.C. § 1145; emphasis added). Section 515 does not require contributions to be made where otherwise required by labor law, but applies only where the "collectively bargained agreement" itself obligates the employer to make contributions.

Section 515 is deliberately different from the separate withdrawal liability provision of ERISA; that provision defines an "obligation to contribute," for purposes of determining an employer's withdrawal from a plan, as including an obligation arising under a collective bargaining agreement, or "as a result of a duty under applicable labor-management relations law" (29 U.S.C. § 1392(a)).[2] Withdrawal liability for a

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2 Section 4212 of ERISA (29 U.S.C. § 1392) defines "obligation to contribute" only "[f]or purposes of this part"--that is, Subchapter III, Subtitle E, Part I of ERISA, entitled "Employer Withdrawals." Section 515 is located in Subchapter I, Subtitle B, Part 5 of the statute, and is therefore unaffected by section 4212. The Ninth Circuit in Advanced Lightweight Concrete expressly rejected the district court's reasoning to the contrary in Laborers Health and Welfare Trust Fund v. Hess (N.D.Cal. 1984) 594 F.Supp. 273. Congress chose to provide special damages for recovery of contributions only where contributions were delinquent under an

(Footnote Continued)

plan's unfunded vested benefits is imposed when an employer withdraws from a multi-employer pension plan (29 U.S.C. § 1381); a complete withdrawal occurs when the employer "permanently ceases to have an obligation to contribute under the plan" (29 U.S.C. § 1383(a)(1)). The broad definition of the cessation of the "obligation to contribute" under the withdrawal liability provisions is necessary to prevent withdrawal liability from being imposed every time a collective bargaining agreement expires. Since there may be a short hiatus between expiration of one contract and agreement on a new contract which also requires contributions, imposing withdrawal

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(Footnote Continued)

agreement (Advanced Lightweight Concrete, supra, 779 F.2d 502; Moldovan v. Great Atlantic & Pacific Tea Co., Inc. (3 Cir. 1986) 790 F.2d 894, 901).

liability immediately upon cessation of a contractual obligation to contribute would interfere with collective bargaining by putting pressure on employers to accede to union demands before the prior agreement expired.

Congress enacted section 515 to prevent an employer from asserting claims and defenses unrelated to its promise to contribute in an action to recover delinquent contributions.[3] Congress intended to simplify collections of delinquent contributions (Pet., pp. 10-11), but only where the contributions are delinquent under the terms of a collective bargaining

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3 Senate Committee on Labor and Human Resources, S 1076--The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d.Sess., 44 (Comm.Print, Apr. 1980) (1980 Senate Labor Comm.Print). See also Kaiser Steel Corp. v. Mullins (1982) 455 U.S. 72, 87.

agreement. There is no basis for suggesting that Congress intended to alter the claims and defenses related to unilateral changes in benefits and the duty to bargain under the National Labor Relations Act (see infra, p. 15, n. 5). Nothing suggests that Congress intended section 515 to create a new and independent obligation under ERISA to continue contributions after contract expiration.

Every Court of Appeals to address the issue has held that an employer's failure to make contributions after the termination of a collective bargaining agreement does not violate section 515 or any other provision of ERISA (Moldovan v. Great Atlantic & Pacific Tea Co., Inc. (3 Cir. 1986) 790 F.2d 894; U.A. 198 Health & Welfare v. Rester Refrigeration (5 Cir. 1986) 790 F.2d 423). The Ninth Circuit's summary affirmance in the instant case, based on Advanced

Lightweight Concrete and similar decisions, presents no issue worthy of consideration by this Court and should be left undisturbed.

II. PETITIONERS' CLAIMS DERIVE SOLELY FROM THE NATIONAL LABOR RELATIONS ACT AND ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE NLRB.

It is undisputed that the collective bargaining agreement in this case expired on March 31, 1984. Any claim that contributions were due after that date could arise, if at all, only under the National Labor Relations Act, which requires an employer to bargain in good faith after the expiration of a collective bargaining agreement and to maintain the status quo until an impasse or union waiver. Failure to maintain the status quo

under such circumstances is an unfair labor practice.[4]

This Court has long held that such unfair labor practices fall within the special competence and exclusive jurisdiction of the NLRB (see San Diego Unions v. Garmon (1959) 359 U.S. 236, 244-245; Kaiser Steel Corp. v. Mullins (1982) 455 U.S. 72, 86). The NLRB is charged by Congress to balance the conflicting interests of labor and management, and the instant case poses the very type of factual and legal issues that are within the NLRB's exclusive jurisdiction to determine. Whether Formetrics' cessation of contributions violated its duty to bargain in good faith is an issue reserved

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4 See, e.g., Peerless Roofing Co. Ltd. v. N.L.R.B. (9 Cir. 1981) 641 F.2d 734, 736. See also Labor Board v. Katz (1962) 369 U.S. 736, 743.

for the NLRB and its specialized expertise. For example, affirmative defenses of impasse and waiver may properly be raised to justify an employer's unilateral changes in benefits.[5]

Such fundamental questions of federal labor law must be resolved by the NLRB. The NLRB must first determine whether there is any obligation of the employer to make post-contract payments before the contributions can be considered

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5 The NLRB has found that an employer is free to make unilateral changes where a union waives its right to bargain or when an impasse has been reached (see e.g. Coppus Engineering Corp. (1972) 195 NLRB 595; Taft Broadcasting Co. (1967) 163 NLRB 475, 478, affirmed (D.C.Cir. 1968) 395 F.2d 622). Also, a union cannot charge an employer with refusal to negotiate if the union has not made an effort to engage in bargaining with the employer (N.L.R.B. v. Alva Allen Industries, Inc. (9 Cir. 1966) 369 F.2d 310, 321).

delinquent.[6] "Without a [NLRA] section 8(a)(5) violation, there is no section 515 infraction under ERISA" (Advanced Lightweight Concrete, supra, 779 F.2d 504).

III. PETITIONERS HAD AN ADEQUATE REMEDY BEFORE THE NLRB.

Petitioners' assertion that they have no recourse to the NLRB because the NLRB has denied the Union's unfair labor practice charge as untimely (Pet., pp. 11, 17) is without merit. The Trust Funds, like any other party, have "standing" to bring an unfair labor practice charge before the NLRB (29 U.S.C. § 160(b);

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6 The fact that such fundamental questions of federal labor law are central to the existence of an obligation to contribute refutes petitioners' assertion that this case presents only "collateral" issues of labor law (Pet., p. 10).

29 C.F.R. § 102.9). Petitioners have not been denied a forum before the NLRB; petitioners have simply failed to seek an NLRB hearing.

Petitioners' assertion that they would have been restricted in any NLRB proceeding by a six-month statute of limitations under section 10(b) of the National Labor Relations Act (29 U.S.C. § 160(b); Pet., p. 15) is disingenuous. Petitioners clearly had the opportunity to file an NLRB charge within the six-month period: Petitioners filed their district court action on September 21, 1984, within six months of the expiration of the collective bargaining agreement. If petitioners were of the view that Formetrics was obligated under the National Labor Relations Act to continue contributions following the expiration of the collective bargaining agreement, they

had ample opportunity to bring an unfair labor practice charge before the NLRB.[7]

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7 Contrary to petitioners' assertion (Pet., p. 16), the NLRB awards liquidated damages to trust funds in unfair labor practice proceedings where the amount may be determined from the documents governing the trust fund (Peerless Roofing Co. Ltd. (1980) 247 NLRB 500, 505, affirmed (9 Cir. 1981) 641 F.2d 734; see also Clerks and Checkers Local No. 1593 (1979) 243 NLRB 8, 9, n. 4, affirmed (5 Cir. 1981) 644 F.2d 408).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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